IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 240 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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ENVISION ENGINEERING

Versus

SACHIN INFA ENVIRO LTD.

Appearance:

1. Appeal from Order No. 240 of 2001

MR MIHIR THAKORE SR. ADVOCATE WITH MR VIPUL S MODI and MR MEHUL H RATHOD for appellant

MR SURESH N SHELAT SR. ADVOCATE WITH MR MITUL K SHELAT for Respondent No. 1-2

MR RR MARSHALL for Respondent No. 3

Respondent No. 4 served

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 09/05/2002

C. A. V. JUDGEMENT

1. What is challenged in this Appeal from Order

filed under Order 43 Rule 1 (r) of the Code of Civil Procedure ('the Code' for short) is the order dated May 5, 2001 recorded below application Ex.5 in Special Civil Suit No.350 of 2000 by the learned Civil Judge (S.D.)., Surat by which application Ex.5 filed under Order 39 Rule 1 and 2 of the Code by appellant against respondents restraining them from committing breach of the terms and conditions of the tender and consequential right existing in favour of the appellant and further to restrain the respondents from assigning to anyone the construction work of Common Effluent Treatment Plant ('CETP' for short) of Sachin Infa-Enviro Limited, respondent No.1, till disposal of the suit, came to be rejected and thereby the interim injunction granted earlier has been vacated.

2. Appellant is the original plaintiff whereas respondents are the original defendants and for the sake of convenience and brevity, they shall be referred to as 'the plaintiff' and 'the defendants' in this judgment.

3. The plaintiff is a registered partnership firm, doing the work of Pollution Control Consulting & Engineering. Defendant No.1 is a company for CETP in the area of Sachin at Surat. Defendant Nos.2 is the Chairman of defendant No.1 company and defendant No.4 is a consultant of the above-said project.

4. According to the plaintiff, the project is of basic cost of Rs.1950 lacs. The plaintiff and defendant No.3 jointly filled the pre-qualification tender for the project of CETP and their tender totalling Rs.15,70,57,872/- was accepted and they were informed accordingly. Thereafter defendant No.3 started the work of civil engineering. According to the plaintiff, at the time of filling tender, it had paid 40% of the tender amount of Rs.2 lacs of its share by cheque to defendant No.3 and in this way, the earnest money deposit was given by the plaintiff. According to the plaintiff, when the tender was sanctioned and letter of indent was given, defendant No.2 called the plaintiff and asked them to use low quality materials and as the plaintiff asked to give the said change in materials, if any, in writing, defendant No.2 threatened to remove the plaintiff from the project and the defendants in collusion with each other are not giving the details of work to the plaintiff though repeated requests are made to them by the plaintiff. According to the plaintiff, it is time to start technical work but the defendants are trying to ruin the valuable rights of the plaintiff by which the business reputation of the plaintiff will be affected.

So the plaintiff is constrained to file the suit for specific performance of contract and tender sanctioned in favour of the plaintiff and defendant No.3 and letter of indent dated January 16, 1999 issued in their favour respectively. It is also prayed to award damage of Rs.2,91,10,000/- together with interest at the rate of 24% from the date of filing of the suit till its realization and also for permanent injunction against defendants restraining them from committing breach of the terms and conditions of the tender and consequential right existing in favour of the plaintiff and further to restrain the defendants from assigning to anyone the construction work of CETP of Sachin Infa-Enviro Limited, defendant No.1, till disposal of the suit and also mandatory injunction against the defendants to give details about the work and to get the work to be done through the plaintiff.

5. Alongwith the suit, application Ex.5 is also moved by the plaintiff wherein ad-interim relief is claimed against the defendants for restraining them from committing breach of the terms and conditions of the tender and consequential right existing in favour of the plaintiff and further to restrain the defendants from assigning to anyone the construction work of CETP of Sachin Infa-Enviro Limited, defendant No.1, till disposal of the suit. In the said application, prima facie case and balance of convenience in its favour is pleaded and it is also pleaded that if ad-interim injunction as prayed for is not granted, plaintiff will have to suffer irreparable loss and, therefore, it is prayed to grant ad-interim injunction as prayed for in prayer clause para 21 (A) of the application.

6. On service of notice, defendants appeared and filed their written objections. Defendant Nos.1 and 2 in their written objections, inter alia, denied all the allegations made in the application. It is contended that there is no relations between the plaintiff and defendant Nos.1 and 2. It is also contended that plaintiff has concealed the fact of contract dated February 27, 1999 indentionally and in these circumstances, under Order 7 Rule 11 of the Code, it is required to be stayed under Arbitration Act. It is further contended that as per the Partnership Act names of all partners are required to be shown but such names are not on record and looking to the pleadings of plaintiff, it is clear that the plaintiff intends to make service tender. It is also contended by the replying defendants that work of defendant No.1 is to be carried out as per direction of this High Court. It is also

contended that the suit is bad for misjoinder of parties as the plaintiff has not joined Government of Gujarat, Central Government and Financial Institutions which have financed in the construction of CETP at Sachin. It is also denied by them that the tender was filled in by the plaintiff alongwith defendant No.3. It is also pleaded that plaintiff has never entertained these defendants and defendant No.1 has never acknowledged the plaintiff for tender procedures and since the plaintiff being a third party for defendant Nos.1 and 2, no right arises in its favour as per law on the basis of the Memorandum of Understanding existed between the plaintiff and defendant No.3. It is also contended that plaintiff has produced forged documents in the proceedings. There is no prima facie case nor balance of convenience in favour of the plaintiff and therefore there is no question of considering the aspect of irreparable loss in favour of the plaintiff. On the contrary, if the injunction as prayed for is granted, defendants will suffer irreparable loss as the construction work of CETP will not be completed though ordered by the High Court to complete the same in time bound programme. They, therefore, prayed to dismiss application Ex.5.

7. Defendant No.3 has also filed separate written objections in which it is contended that as per the provisions of Section 69 of the Partnership Act it is necessary to show names of all partners in the certificate of registration of firm but the plaintiff has not done so and looking to the dispute of the plaintiff it is of specific performance of contract in which circumstances it can only ask for the loss but no injunction can be granted. It is also contended that since the matter is pending before the High Court and the High Court has extended the time limit twice for completion of the construction work of CETP if the order of ad-interim injunction granted by the Court at the initial stage is continued for a long time the order of the High Court cannot be complied with. It is also asserted by defendant No.3 that it wanted to fill the tender floated by defendant No.1. No contract was made between the plaintiff and defendant No.3 and Memorandum of Understanding was made thereafter when the plaintiff becomes ready to move forward, the detailed contract will be made taking into account the Memorandum of Understanding and due to shortage of time, the pre-qualified tender was filled by the plaintiff and defendant No.3 jointly the arrangement of time and pre-qualified tender was filled by the plaintiff and defendant No.3 jointly. It is also contended that at the time of final tender, as plaintiff was not ready to take

responsibility, defendant No.3 only filled in the final tender. It is also contended that as per the contract dated February 27, 1999 between defendant Nos.1 and 3, work was started in February 1999 within the knowledge of the plaintiff and others and there is no question of sending work acceptance letter dated January 16, 1999 to the plaintiff. It is also denied by defendant No.3 that amount of Rs. 2 lacs has been paid by the plaintiff. It is also asserted that the plaintiff has forged the document dated January 16, 1999. It is denied that defendants are in collusion with each other. Ultimately it is claimed that plaintiff has no prima facie case nor balance of convenience tilts in its favour and hence there no question of considering irreparable loss in favour of the plaintiff. Lastly it is contended that as per the provisions of Specific Relief Act and Contract Act, the dispute of the plaintiff is with respect to special work and the dispute is not tenable under the provisions of Arbitration Act. Defendant No.3 therefore prayed to dismiss the application Ex.5.

8. Defendant No.4 has also filed written objection contending that it has been wrongly impleaded in the suit. It is contended that it is the consultant appointed for the said project on behalf of defendant No.1 and its function is only to supervise as to whether the work is going on as per the design prepared by it. The plaint is bad for misjoinder of parties. So far as rest of the averments made in the application are concerned, defendant No.4 has no personal knowledge and therefore it prayed to dismiss the application Ex.5.

9. The learned Judge, after hearing the learned advocates appearing for the parties and on analysis, appreciation and evaluation of the pleadings and the documents annexed therewith, came to the conclusion that the tender was filled in by defendant No.3 only and the payment transactions are also made by defendant No.3 in the tender. In the entire correspondence, name of the plaintiff has not been shown and therefore there is no prima facie case in favour of the plaintiff nor balance of convenience tilts in its favour. It is further held that irreparable injury would be caused to the defendants if injunction as prayed for is granted because the construction work of CETP would be delayed which would tantamount to defying the order passed by this High Court by which it is ordered to complete the construction work of CETP at Sachin in time and resultantly the learned Judge of the lower Court has rejected the application Ex.5 and thereby interim injunction granted earlier has been vacated which has given rise to the present AO at

the instance of the original plaintiff.

10. Mr. Mihir Thakore, learned Senior Counsel for the plaintiff contended that tenders were invited by defendant No.1 for establishment of CETP at Sachin Industrial Estate and pursuant to the same, the plaintiff, who is a qualified engineer in environmental science, in association with defendant No.3, filled up tender at pre-qualification stage and thereafter Memorandum of Understanding was signed between plaintiff and defendant No.1. Pursuant to the signing of the Memorandum of Understanding the plaintiff has paid Rs.2 lacs to defendant No.3 on 29.12.1998. Therefore there was a joint bid between the plaintiff and defendant No.1 which is established by various correspondence made by defendant No.1 in the joint name of the plaintiff and defendant No.3. Notwithstanding the voluminous evidence on record to establish that the tender was filled by plaintiff and defendant No.3 jointly which was accepted by defendant No.1, the learned Judge of the lower court has held that the plaintiff has failed to prove that it is a contracting party with defendant No.1. The said finding of the learned Judge of the lower court suffers from non-application of mind to the material on record. It is emphasized by the learned counsel that it is true that the xerox copy of the Memorandum of Understanding produced by defendant No.3 at mark 27/3 and xerox copy of the same Memorandum of Understanding produced by plaintiff at mark 3/3 are not similar. In case the document produced by defendant No.3 is accepted as a genuine document then also it is established beyond doubt that there is a joint bid between the plaintiff and defendant No.1 and, therefore, the finding recorded by the learned Judge is in total disregard to the material placed on record and is based on extraneous grounds even which are not borne out from the record of the case. It is also asserted by the learned counsel that the learned Judge has grossly erred in coming to the conclusion that the correspondence and letter of indent do not show name of the plaintiff. What is highlighted by the learned counsel is that the most important document, that is, letter of indent dated January 16, 1999 produced on record by the Court Commissioner at mark 58/3 and mark 59/13 were from the office of defendant No.1 and it bears name of the plaintiff as addressee of the letter and therefore the finding of the learned Judge of the lower court is perverse and suffers from the non-application of mind to the material placed on the record of the case and most important documents are not considered and appreciated by the learned Judge which were produced on a notice under Order 11 Rule 12 of the Code. Therefore,

according to the learned counsel, the findings recorded by the learned Judge are contrary to the material on record and suffer from non-application of mind and therefore the Appeal from Order deserves to be allowed.

Besides this, it is further contended that the project of setting up of CETP is being carried out with the financial assistance of Central Government, State Government, World Bank and also getting 25% subsidy. Thus, the entire project is being set up by the public money wherein the element of public interest is involved. It is not a case of contract of private nature wherein no public money or public interest is involved. In view of this also, considering the equity, justice and good conscience as public money and public interest cannot be jeopardized for unjust and illegal demand of defendant No.2 by using inferior quality material which has been stated by the plaintiff on oath and in view of this also the plaintiff is entitled to decree of specific performance of the acceptance of joint tender granted in favour of the plaintiff and defendant No.3 and letter of indent dated January 16, 1999. According to the learned counsel, there is voluminous evidence in favour of the plaintiff that it is entitled to get decree as prayed for in the plaint for the specific performance of contract and grant of tender in favour of the joint name of plaintiff and defendant No.3 and letter of indent dated January 16, 1999.

The learned counsel further submitted that there is a prima facie case in favour of the plaintiff and if during the pendency of the suit defendant No.1 gives the said contract to other persons and in the event of passing a decree in favour of the plaintiff, it would become infructuous and therefore balance of convenience also tilts in its favour. So far as irreparable injury is concerned, it is emphasized by the learned counsel that if the injunction as prayed for is not granted, the plaintiff would have to suffer irreparable injury which cannot be compensated in terms of money as it would be deprived of completing the work which was jointly assigned to it and defendant No.3 inasmuch as the reputation of the plaintiff as an expert in environment engineering would be adversely affected if it will not be permitted to complete the work and therefore according to the learned counsel, the order recorded below application Ex.5 is contrary to the evidence produced before the trial court and settled principles with respect to granting of relief of specific performance of contract as well as ancillary relief of injunction and therefore the order impugned is liable to be quashed and set aside by

granting the prayer made in application Ex.5 restraining the defendants from giving the work of the said CETP to any other agency till the disposal of the suit and, therefore, this Appeal from Order deserves to be allowed and the learned counsel urged that the Appeal from Order may be allowed.

Mr. Thakore, learned counsel has cited the judgment of Madras High Court in the case of K.M. Jainabibi and others v. M.K. Govindswami, AIR 1967 Madras 269 to canvass the proposition that the Courts could take note of the subsequent event pending appeal and had the power to grant decree of specific performance of contract if during the pendency of the suit or appeal the tender which was granted for the work to be done is about to complete.

11. Mr. S.N. Shelat, learned Senior Counsel who appears for defendant Nos.1 and 2 contended that the letter of indent dated January 16, 1998 issued jointly in favour of plaintiff and defendant No.3 is a joint venture contract and, therefore, the plaintiff alone has no right to file the suit for specific performance of contract as sought for. It is also contended that the genuineness of the alleged letter of indent dated January 16, 1999 itself is doubtful and, therefore, unless that aspect is cleared, enforcement of the same cannot arise. The learned counsel further contended that there cannot be specific performance unless the enforcement which is sought for is clear and certain. What is asserted by the learned counsel is that there is no privity of contract between the plaintiff and defendant No.1. The documents on record clearly reveal that the presence of the plaintiff was only till the stage of pre-qualification. The documents on record unequivocally establish that the final tender was filled only by defendant No.3 and the letter of acceptance was also issued in favour of defendant No.3 only and, therefore, according to the learned counsel, there is no prima facie case in favour of the plaintiff. It is also emphasized by the learned counsel that balance of convenience also does not tilt in favour of the plaintiff. According to him, it tilts in favour of the defendant No.1 only. So far as irreparable injury is concerned, according to the learned counsel, it would be caused to defendants if the stay as sought for and ad-interim injunction as for is granted in favour of the plaintiff. There is already delay of two years as the suit came to be filed in the year 2000 and since then the work of CETP which is in public interest is incomplete and the delay in installation causes nuisance and escalation of costs. What is empathized by the

learned counsel is that the relief sought for is the specific enforcement of the contract but no such relief can be granted in view of the clear bar contained in section 14 (1) of the Specific Relief Act ('the Act' for short) as the proviso to the said section is not applicable to the facts of the present case. It is also asserted by the learned counsel that the contention made by the learned counsel for the plaintiff that if the injunction is not granted to the plaintiff, his good will would be at stake and it would suffer loss of goodwill has no substance in view of the settled principles enunciated by the Supreme Court that relief of specific performance of contract cannot be granted merely on the ground that there will be loss of goodwill or the reputation is at stake. Lastly it is submitted that there is a very limited scope for interference in the Appeal from Order which is filed under Order 43 Rule 1 (r) of the Code unless it is shown that the impugned order is perverse, capricious or arbitrary and passed ignoring all the aspects of prima facie case, balance of convenience then and then only the appellate court can interfere. On the aforesaid premises, the learned counsel submitted that there is no substance in this AO which is meritless and hence deserves to be dismissed and therefore urged to dismiss the AO.

So far as balance of convenience is concerned, the learned counsel contended that it does not tilt in favour of the plaintiff as CETP is to be installed in pursuance of the order issued by this Court and if the CETP is not installed in time there would be clear breach of the order passed by this Court and on account of injunction 60 industrial units who are members of defendant No.1 would be affected and may face prosecution for disobeying the directions of this Court as well as for breach of Environment Laws.

In support of the aforesaid submission, learned counsel has relief upon the following decisions:

(i) Ganesh Shet v. Dr. C.S.G.K. Setty & Ors., JT 1998 (4) SC 181;
(ii) M.C. Chacko v. The State Bank of Travancore, AIR 1970 SC 504;
(iii) Raunaq International Ltd. v. I.V.R. Construction Limited, AIR 1999 SC 393;
(iv) Colgate Palmolive (India) Ltd. v. Hindustan Lever Limited, AIR 1999 SC 3105; and
(v) Her Highness Maharani Shantadevi P. Gaekwad v. Savjibhai Haribhai Patel, 2001 (3) GLR 2097.
(vi) Wander Limited and another v. Antox India P.

Ltd., 1990 (Supp) SCC 727.

12. Mr. R.R. Marshall, learned counsel for defendant No.3 has contended that the project was not funded by the World Bank. It is also asserted that the plaintiff had made absolutely improper and ineffective attempt to show that it was involved along with defendant No.3 when the contract was awarded. The record does not indicate that the final bid was made by defendant No.3 in collaboration with the plaintiff as all the documents produced by the plaintiff in support of its say are of pre-bid stage. Since there is difference arose between the plaintiff and defendant No.3 the plaintiff decided not to bid for contract with defendant No.3 and defendant No.3 has made bid of contract and there is voluminous evidence in this regard. It is also emphasized by the learned counsel that the say of the plaintiff that it alone has the technical specialization for effluents treatment scheme is totally unfounded and baseless. It is emphasized by the learned counsel that the plaintiff has no right to ask for specific performance of letter of indent dated January 16, 1999 and the tender issued in favour of defendant No.3. According to the learned counsel, at the most, if at all ultimately the plaintiff succeeds, in such case, his only right is to claim damages either from defendant No.1 or from defendant No.3. The learned counsel has also contended that the Division Bench of this Court has passed the order for installation of CETP at Sachin which is to be carried out by defendant No.1 as the said work is entrusted to it by the order of this Court and therefore if there is any defiance in the said order by not establishing the plant in time all the industrial units situated at Sachin has to face prosecution and therefore there is no prima facie case, nor balance of convenience in favour of the plaintiff as the plaintiff is not entitled to claim specific performance of the letter of indent dated January 16, 1999 as sought for. He further contended that the AO is having no merit and hence it is urged that the AO may be dismissed.

13. I have considered the submissions advanced by the learned counsel appearing for the parties. I have also perused the memo of appeal, grounds set out therein and the impugned order which is the subject matter of challenge in this AO, the paper book containing pleadings of the parties as well as documents produced in the lower court prepared and supplied by Mr. Thakore, learned counsel for the plaintiff during the course of his submission.

14. At the outset be it noted that the relief sought for in the suit and in application Ex.5 is the specific performance of letter of indent dated January 16, 1999. There are two letters of indent dated January 16, 1999 on record. One letter of indent is at mark 3/2 which is sought to be relied on by the plaintiff whereas the second letter of indent dated January 16, 1999 is at mark 28/2 which is sought to be produced on record and relied on by defendant No.3. On having perusal of mark 3/2 it is addressed to M/s. Bharodia Construction Limited in association with M/s. Envision Engineering whereas letter of indent produced at mark 28/3 is addressed to M/s. Bharodia Construction Limited only. According to the case of defendant No.1, letter produced at mark 3/2 is a forged document because according to defendant No.1 the final bid was made by defendant No.3 only but at pre-qualified stage bid was made by defendant No.3 in association with the plaintiff. Thereafter for the reasons best known to the plaintiff and defendant No.3 the plaintiff did not participate in the final bid and therefore defendant No.1 has issued letter of indent dated January 16, 1999 in favour of defendant No.3 only. Now in light of the aforesaid position, we have to find out from the record of the case as to whether defendant No.3 and plaintiff jointly made the final bid or defendant No.3 alone made final bid.

15. On having perusal of the documents forming part of the trial court's record they clearly reveal that the presence of the plaintiff was only at the stage of pre-qualification. The documents produced at page 155 to 162 clearly indicate that tender was filled by defendant No.3 only. The letter of accpetance was also addressed to defendant No.3 and form of contract mark 27/2 page 94 shows that it has been entered into between defendant No.1 and defendant No.3 only. In the said form of contract plaintiff was never a party and therefore there is nothing on record to show that the contract was executed between the plaintiff and defendant No.3 on one hand and defendant No.1 on the other. In view of the aforesaid position, there is no manner of doubt that the genuineness of the letter of intend dated January 16, 1999 is doubtful and therefore no reliance can be placed upon the said letter of indent. In the case of Ganesh Shet (supra), the Supreme Court has said that it is well settled that in a suit for specific performance the evidence and proof of agreement must be absolutely clear and certain. Applying the principles laid down by the Supreme court in the above referred to judgment to the facts of the present case, at the cost of repetition, be it stated that the genuineness of the letter of indent

dated January 16, 1999 is doubtful as there are two letters on record and defendant No.1 has denied to have issued the letter of indent in favour of the plaintiff and in the absence of any cogent evidence to show that there is collusion between defendant No.1 and defendant No.3 no reliance can be placed upon the letter of indent dated January 16, 1999 produced by the plaintiff and therefore, such a contract can never be specifically enforced.

16. It is also settled principles of law that only a person who is a party to the contract can seek specific performance thereof. In this connection, it would be appropriate to refer to the judgment of the Supreme Court in M.C. Chacko's case (supra). In the said case the Supreme Court has observed that a person not a party to a contract cannot, subject to certain well recognized exceptions, enforce the terms of the contract; the recognized exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant. Applying the principles enunciated by the Supreme Court in the above referred to judgment to the facts of the present case, when the plaintiff was not a party to the contract, he cannot seek relief of specific performance of letter of indent dated January 16, 1999. Besides this even if for the purpose of argument it is accepted that the letter of indent dated January 16, 1999 was addressed to the plaintiff and defendant No.3 jointly, in that case also the specific performance thereof has to be prayed for by both the joint contractors and it should also be for the benefit of both. In case of single indivisible contract one of the joint contractees cannot seek specific performance if the other contractees do not want that relief.

17. Mr. Thakore, learned counsel for the plaintiff submitted that defendant Nos.1 and 3 are in collusion and therefore even at the instance of one of the joint bidders suit for specific performance of the letter of indent is maintainable. Here there is no cogent proof that defendant Nos.1 and 3 are in collusion with each other except the bald averment made in the plaint that defendant Nos.1 and 3 are in collusion with each other.

18. The submission of the plaintiff that defendant No.3 was only pre-qualified because of it being associated with the plaintiff is misconceived. The pre-qualification requirement was experience in the installation of CETP. On having perusal of the letter at page 198 against the 14-15 mentioned installations the

installations at items 07-14 have been done by defendant No.3 alone which would indicate that it had the experience in the field of installation of CETP. Further the contract was only for installation of the CETP. As regards the design, etc., efendant No.4 Multi Media Consulting Engineers were consultants appointed by defendant No.1. Further more, the plaintiff does not possess any special qualification which would entitle it to claim expertise in the field of installation of CETP. In this view of the matter, the assertion of the plaintiff in this regard is misconceive and devoid of any merit.

19. In view of the discussion made hereinabove, I am of the opinion that there is no prima facie case in favour of the plaintiff as he is note entitled to claim the specific performance of the letter of indent dated January 16, 1999 as sought for by him in the suit and therefore he is not entitle to have the interim injunction in his favour.

20. So far as the balance of convenience is concerned, it is to be not that the CETP is being installed in compliance with the directions issued by this Court in CA No.5981 of 1997 and cognate matters (page 109 to 135 of the paper book). The directions are at page 125 para 28 wherein it was directed that the plant shall be installed by September 1999. Since there were some teething problems, extension was sought by filing MCA No.943 of 2000 wherein extension was granted upto December 27, 2000 vide order dated July 12, 2000. On July 24, 2000 the suit was filed and injunction was granted restraining defendant No.1 from carrying on the work of installation of the CETP. Thereafter MCA No.356 of 2002 has been filed on February 22, 2002 seeking extension of time in view of the injunction operating against defendant No.1. The Court has fixed the matter for hearing on May 9, 2002. Continuance of injunction has resulted into the non-installation of the CETP by defendant No.1 and consequently the directions of the High Court are being violated. It is also required to be noted that on account of injunction 60 industrial units who are the members of defendant No.1 company would be adversely affected and could face prosecution for disobeying the dierctions of the High Court as well as for breach of provisions of the Environment Laws.

21. In view of the aforesaid factual position, balance of convenience tilts in favour of defendant No.1 and not in favour of the plaintiff as by virtue of the injunction it has prevented defendant No.1 from

installing the CETP for the last two years which would be in breach of the order of this Court when there is no privity of contract between the plaintiff and defendant No.1.

22. Assuming that there is a contract between the plaintiff and defendant No.1, the present action would tantamount to a breach of contract which would result into quantifiable financial loss to the plaintiff. The loss being ascertainable in monetary terms, there is no irreparable injury or loss likely to be suffered by the plaintiff. As admitted in the plaint itself the contract is for installation of CETP. The same is therefore in public interest and delay in the installation of CETP would cause nuisance as well as escalation of cost. By virtue of injunction the installation is already delayed by two years. It is now settled law that the court would not grant an injunction restraining the execution of public projects which would result into delay in time and escalation of price.

23. In this connection it would be appropriate to refer to the judgment of the Supreme Court in Raunaq International's case (supra). The Supreme Court in para 24 of the said judgment has held as under:

"24. Dealing with interim orders, this Court observed in Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd., (1985) 2 SCR 190 at page 196 : (AIR 1985 SC 330 at p. 333) that an interim order should not be granted without considering balance of convenience, the public interest involved and the financial impact of an interim order. Similarly, in Ramniklal N. Bhutta v. State of Maharashtra, (1997) 1 SCC 134 : (1997 AIR SCW 1281), the Court said that while granting a Stay the Court should arrive at a proper balancing of competing interests and grant a stay only when there is an overwhelming public interest in granting it, as against the public detriment which may be caused by granting a stay. Therefore, in granting an injunction of stay order against the award of a contract by the Government or a Government agency, the Court has to satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out within a reasonable time. The Court must also take into account the cost involved in staying the project and whether the public would stand to benefit by incurring

such cost."

24. In Colgate Palmolive's case (supra), in para 24 the Supreme Court has observed as under:

"24. We, however, think it fit to note hereinbelow certain specific considerations in the matter of grant of interlocutory injunction, the basic being non-expression of opinion as to the merits of the matter by the Court, since the issue of grant of injunction usually, is at the earliest possible stage so far as the time-frame is concerned. The other considerations which ought to weigh with the Court hearing the application or petition for the grant of injunctions are as below:-

(i) Extent of damages being an adequate remedy;

(ii) Protect the plaintiff's interest for violation of his rights though however having regard to the injury that may be suffered by the defendants by reason therefor;

(iii) The Court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the others;

(iv) No fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case -the relief being kept flexible;

(v) The issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;

(vi) Balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) Whether the grant or refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise."

Applying the principles enunciated by the Supreme Court in the above referred to two judgments to the facts of the present case, the plaintiff sought injunction way back in the year 2000 which has remained operative till today and because of the said injunction defendant No.1

is unable to install CETP and there is absolutely no evidence in its favour to show that it was a party to the contract and therefore it is not entitled to injunction as prayed for. Even on the basis of the evidence which has been discussed above, the plaintiff is not entitled to get the specific performance of the letter of indent dated January 16, 1999.

25. Nos, so far as statutory provisions with respect to granting of relief of specific performance of contract are concerned, there is a clear embargo under sub-section (1) of section 14 of the Act which would disentitle the plaintiff to claim relief of specific performance in its favour. It would be appropriate to quote the said provision hereinbelow:

"14. Contracts not specifically enforceable.(1) The following contracts cannot be specifically enforced, namely:--

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise;

xxx xxx xxx xxx xxx"

Applying the statutory provision as referred to above to the facts of the present case, the contrac is not specifically enforceable in view of the following salient features:

(i) The contract is for installation of plant and machinery, therefore, compensation in money is an adequate relief for non-performance;

(ii) The contract is for installation of a CETP and it is in the nature of a work order.

(iii) The contract is continuous in nature inasmuch as it runs into minute and numerous details;

(iv) The contract is determinable in nature in terms of the tender documents which form part of the

contract; and

(v) The contract involves performance of a continuous duty.

Therefore, in my view, in view of the clear bar contained in section 14 (1) of the Act and the salient features discussed above, the contract of which specific performance is claimed by the plaintiff cannot be specifically enforced.

26. The contention of Mr. Thakore, learned counsel for the plaintiff that the proviso to Section 14 of the Act is applicable to the facts of the present case, has no substance. In my view, the proviso to section 14 of the Act is not applicable to the facts of the present case since the present contract is for installation of the CETP. The said contract is not a contract for the construction of building or execution of any other work on the land. The proviso further clearly provides that even for enforcement in such a case the following three conditions shall have to be fulfilled:

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

In the present case none of the above mentioned conditions are existing. The land is of the ownership of the defendants, the plaintiff has no substantial interest in the performance the contract, further compensation in monetary is an adequate relief and the contract is not such that the court can precisely determine or supervise. Consequently the said proviso would not apply to the facts of the present case and hence the contract would not be specifically enforceable.

27. In this connection, it would be appropriate to refer to the following passage from the book GT Gajria's Law relating to Building and Engineering Contracts in India, 4th Edition, page 432 which deals with specific performance as under:

"(VI) SPECIFIC PERFORMANCE

85. DISCRETIONARY

Specific performance is a relief granted by the court ordering the defendant to perform the promise, i.e., to carry out a legally binding contractual obligation. It is an equitable relief granted by the court in its discretion to be exercised according to well established principles. Thus, it will not grant relief by way of specific performance, where the common law remedy of damages will adequately compensate the party suffering from breach nor where the court cannot properly supervise performance. The law in England and India is practically the same. The law relating to specific performance in India, is incorporated in S.10, Specific Relief Act, 1963, according to which the specific performance of any contract is in the discretion of the court and may be enforced (i) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or (ii) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. Also under S.14 (a) of the said Specific Relief Act, a contract for the non-performance of which compensation in money is an adequate relief, cannot be specifically enforced. The remedy of specific performance is only permitted by the courts in the comparatively rare cases where damages will not be an adequate compensation to a wronged party.

It is now well settled that on account of the great difficulty and often impossibility attending a judicial superintendent and execution of the performance, contracts for the erection or repair of buildings, the construction of works, and the conduct of operations requiring time, special knowledge, skill, and personal oversight, will not be specifically enforced, although in the case of a building agreement where the consideration is the grant of a lease, such relief can be given. Where there is a definite contract by which a person who has acquired land in consideration thereof has agreed to erect on the land so acquired, a building of which the particulars are clearly specified and the erection of which is of an importance to the other party which cannot be adequately measured

by pecuniary damages, that is a case in which according to the doctrine acted upon by courts of equity in relation to such matters, specific performance ought to be ordered.

Where railway and other companies have agreed to execute accommodation works under or in consideration of the passing of their Acts, they may be ordered specifically to perform their agreement unless the court is of opinion that justice between the parties can better be done by an enquiry as to damages than by a decree for specific performance. In such cases, the court will assume jurisdiction to order specific performance where firstly, the work to be done is defined, secondly, the plaintiff has a material interest in its execution, which cannot be adequately compensated for by damages, and thirdly, the defendants have by contract obtained from the plaintiff, possession of the land on which the work is to be done. It would be monstrous if the company, having got the whole benefit of the agreement, could turn round and say, 'this is a sort of thing which the court finds difficult in doing, and will not do. Rather than allow such a gross piece of dishonesty to go unredressed, the court would struggle with any amount of difficulties in order to perform the agreement'. The plaintiff conveyed land to the defendants, who in turn covenanted to forthwith make a road, and reject a market house thereon. The defendants took possession of the land and make the road, but neglected to erect the market-house. It was said that the defendants have had the benefit of the contract in specific, the court would go to any length that it would compel them to specifically perform the contract on their part.

Thus, where railway companies have agreed, in their special Acts, or by subsequent contract, to construct certain works in consideration of the passing of such Acts, or of the acquisition of land for their undertakings, specific performance has in many cases been decreed. But even in these cases, it would seem that a decree for specific performance will not be granted where damages are a sufficient remedy, or where performance would in fact be useless, unless followed by personal service such as the court will not attempt to enforce.

It is now well-settled that the court does not normally grant decree for specific performance in the case of contracts that involve personal service, trust, or skill, or in cases where it would not be able adequately to supervise performance, if it should order it. As a general rule, the court will not compel the building of houses."

28. The plaintiff's case is based on his claim that refusal of the injunction would result into divesting it of the right to perform the contract which would consequently affect its reputation and goodwill in the market and the same being not quantifiable in monetary terms, injunction is the only remedy. The said contention has been dealt with by the Supreme Court in the latest judgment in the case of Her Highness Maharani Shantadevi P. Gaekwad's case (supra). In the said judgment, in para 60, at page 2123, the Supreme Court has observed as under:

"In view of these conclusions, the contention of Mr. Dhanuka that reputation of the plaintiff as a builder would be adversely affected if houses are not built is hardly of any relevance. In any case, in this regard, we may refer to the decision of this Court in K. Narendra v. Riviera Apartments (P.) Ltd., 1999 (5) SCC 77, a case in which this court examined an agreement which contemplated several sanctions and clearances that were not within the power of the parties. The result was that the feasibility of a multi-storeyed complex as proposed and planned became impracticable. In that case too the seller continued to remain in possession. Under these circumstances, it was held that the contract though valid at the time when it was entered, is engrossed in such circumstances that the performance thereof cannot be secured with precision and that the discretionary jurisdiction to decree the specific performance ought not to be exercised. Dealing with the question of reputation of the purchaser as a builder being at stake, this Court held that: "This is hardly a consideration which can weigh against the several circumstances..... If a multi-storeyed complex cannot come up on the suit property, the respondents' plans are going to fail in any case". The position in the present case is quite similar. Under the Scheme as postulated by the

U.L.C. Act, it is not permissible to construct dwelling units for the residence of the weaker sections of the society."

In view of the principles enunciated by the Supreme Court in the above referred to judgment, the contention that the plaintiff's reputation and goodwill in the market would be adversely affected is of no assistance to the plaintiff to get the relief of injunction.

29. It is settled principles of law that in Appeal from Order challenge is against the exercise of discretion by the learned Judge of the lower court in granting or refusing the injunction which is an equitable relief. In such appeals, the appellate Court will not interfere with the exercise of discretion of the Court of the first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle and the appellate court will not reassess the material and seek to reach a conclusion different from one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. The aforesaid principle is enunciated by the Supreme Court in Wander Limited's case (supra).

30. Applying the aforesaid principles enunciated by the Supreme Court to the facts of the present case, at the cost of repetition, be it stated that the learned Judge of the lower Court has not exercised the discretion arbitrarily, or capriciously or perversely or ignored the settled principles of law regulating grant or refusal of interlocutory injunction.

31. On overall view of the matter and in view of the discussion made hereinabove, it is clear that there is no privity of contract between the plaintiff and defendant No.1 as the genuineness of the letter of indent dated January 16, 1999 is doubtful. There is no written

contract made between the plaintiff and defendant No.1 and the documents forming part of the trial court's record do not reveal that the plaintiff was a party to the contract as its name appears upto pre-qualification stage only. The order recorded by the learned Judge of the lower court cannot be said to be passed on "no evidence" and therefore the learned Judge has very rightly held that there is no prima facie case in favour of the plaintiff to grant injunction as prayed for in its favour nor there is balance of convenience in its favour and no irreparable injury would be caused to the plaintiff if an injunction as prayed for is not granted in its favour.

32. On reanalysis, reappreciation and reevaluation of the evidence, I am of the opinion that on the contrary, there is a prima facie case in favour of defendant No.1 as well as balance of convenience also tilts in its favour and irreparable injury would be caused to it if injunction as prayed for is granted in favour of the plaintiff as the continuation of injunction has resulted into non-installation of the CETP by defendant No.1 and directions issued by the High Court for establishing the CETP are not being complied with and on account of that 60 industrial units who are members of defendant No.1 at Sachin would be adversely affected and they may even be faced with prosecution for disobeying the directions of the High Court as well as for violation of the provisions of Environment Laws.

33. In view of the above discussion, I am of the opinion that there is no illegality committed by the learned Judge of the lower court in rejecting the application Ex.5 and therefore there is no valid reason to interfere with the impugned order and hence the Appeal from Order deserves to be dismissed.

34. For the foregoing reasons, the Appeal from Order fails and accordingly it is dismissed with no order as to costs.

35. Interim relief granted by this Court in CA No.6922 of 2001 which was ordered to be continued till final disposal of the Appeal from Order by making rule absolute vide order dated October 5, 2001 shall stand vacated.

(A.M. Kapadia, J.)

36. At this stage, Mr. Mehul Rathod, learned counsel for the plaintiff states that the plaintiff is desirous

of filing appeal before the higher forum against this judgment. He, therefore, urges that the interim relief granted by this court while admitting the Appeal from Order vide order dated October 5, 2001 recorded in Civil Application No. 6922 of 2001 which was ordered to be continued till disposal of the Appeal from Order by making rule absolute may be ordered to continue for a further period of 12 weeks to enable the plaintiff to prefer appeal against this judgment before higher forum.

37. The aforesaid prayer made by Mr. Mehul Rathod is seriously countered by Mr. Mitul Shelat, learned counsel for defendant Nos.1 and 2 and Mr. R.R. Marshall, learned counsel for defendant No.3 by contending that such a prayer cannot be granted in view of the fact that the order of interim injunction which has remained operative for the last two years has prevented the defendants from establishing the CETP as ordered by this Court. Besides this, according to them, when this Court has held that the plaintiff is not entitled to specific performance of the contract and interim injunction, such a relief cannot be granted on the facts and circumstances of the case. They, therefore, urged to reject the said prayer.

38. I have given my anxious considered thoughts to the submissions made by the learned counsel appearing for both the parties. On the facts and in the circumstances emerging from the record of the case, be it noted that relying upon the latest pronouncements of the Supreme Court, I have held that there is no privity of contract between the plaintiff and defendant No.1 and therefore the plaintiff is not entitled to specific performance of the letter of indent dated January 16, 1999 and, therefore, the plaintiff is also not entitled to interim relief. I have also held that by virtue of the interim relief, commencement/ construction of the CETP has been delayed for more than two years inspite of the specific order recorded by this Court to complete the construction of the CETP before a specific date which was extended from time to time and the said matter is fixed by the Division Bench of this Court on May 9, 2002, that is, today, for deciding further line of action for construction of CETP by defendant No.1. In view of the aforesaid state of affairs, the prayer made by Mr. Mehul Rathod cannot be granted and hence the same is rejected.

(A.M. Kapadia, J.)

(karan)